

3813.

CORPORATIONS—WHEN REIMBURSEMENT OF PRIVATE CORPORATION FOR PREMIUMS PAID ON ACCOUNT OF WORKMEN'S COMPENSATION MAY BE HAD.

Reimbursement of a private corporation for premiums paid on account of workmen's compensation, held to be proper under the facts stated in the opinion.

COLUMBUS, OHIO, December 20, 1922

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—You have recently written to this office as follows:

“In Opinion No. 771 of November 10, 1917, Opinions for that year, Volume 3, page 2061, Attorney General McGhee held:

‘Whether a state officer or department constructs an improvement upon force account or upon contract, the contractor employed on the job has no right to charge against the state premiums that may be paid by him for the protection of workmen or other employes employed on the work.’

One of the questions to which the above was an answer was as follows:

‘Will the same ruling apply on contracts of like nature made by counties, municipalities, or other taxing districts?’

In the concluding paragraph, the Attorney General held:

‘That the same ruling should apply on contracts of like nature made by counties, municipalities or other subdivisions.’

The Rapid Transit Commission of the City of Cincinnati created under the provisions of sections 4000-16 et seq. G. C., on the prosecution of their work in said city found it necessary to re-locate the conduits and other under ground construction of The Cincinnati and Suburban Bell Telephone Company. One of the provisions of the agreement between said company and said rapid transit commission was that the said company would be awarded full compensation for all cost, damage and expense incidental to the work of removing, supporting, changing, relocating and reconstructing the parts of its system required to be moved and affected by the terms of the agreement. Said company let contracts for work in question to Wagner and Boehning upon a basis of cost plus 15 per cent. In auditing the amount paid said telephone company it was found that included in the cost of the contractor employed by the said Bell Telephone Company was an item for workmen's compensation paid to The Industrial Commission of Ohio by said Wagner and Boehning.

The powers of the rapid transit commission as indicated by sections 4000-16 to 4000-28 G. C., seem broader than those granted other officers

and boards of the city government and the bureau would greatly appreciate having your opinion relative to the legality of having the City of Cincinnati pay the Cincinnati and Suburban Bell Telephone Company the item of workmen's compensation as a legal part of the cost thereof.

We are enclosing herewith letter received from Mr. J. J. Becker, Auditor of said Company, which is self-explanatory."

The letter from Mr. Becker which you refer to, reads in part as follows:

"Referring to the matter of our agreement with the Board of Rapid Transit Commissioners of the City of Cincinnati to perform at cost certain underground construction work, regarding which Mr. Reed and I called on you on November 29th, the following is a memorandum showing our position in the matter.

On February 10, 1920, the Board of Rapid Transit Commissioners ordered the Cincinnati and Suburban Bell Telephone Company to remove certain underground construction, as part of its building plan. On February 19, 1920, the Company replied that the work would be undertaken with the understanding that the board should 'award full compensation to the Company for all cost, damage and expense which it may suffer or incur in complying with the terms of the above order and pay all cost, expenses and damage incidental to the work of removing, supporting, changing, relocating and reconstructing the parts of its system required to be moved and affected by the terms of the above order.'

A letter dated February 25, 1920, from the Chief Engineer of the Rapid Transit Commission stated:

'At a meeting of the Rapid Transit Commissioners held February 20th, 1920, a motion was passed that The Cincinnati and Suburban Bell Telephone Company be instructed to proceed with the work of removing such conduits, poles, cables, etc., that may be found necessary in the construction of the Rapid Transit system, according to the terms of the letter received from your Company, dated February 19th, 1920.

You will therefore proceed at once and comply with the above order.'

In accordance with our usual practice the work was let to Wagner and Boehning, a firm of contractors in Cincinnati, we agreeing to pay them cost plus 15 per cent.

From time to time as respective sections of the work were completed bills were rendered against the Commission and payment received.

On November 16, 1922, the Chief Engineer of the Commission wrote a letter to the Company saying that the examiner of the State Auditing Department had disapproved the payment of Industrial Insurance which appeared on our bills. Upon taking up the question with the Honorable Percy Tetlow of the Industrial Commission we were advised that the sub-

contractor, being an employer of more than five persons, would be required to carry this insurance and to pay the premiums thereon. This premium therefore becomes part of Wagner and Boehning's cost of doing the work for which we have contracted to pay."

The group of statutes which you refer to, namely, sections 4000-16 to 4000-28 G. C. were originally enacted in the year 1915 by Act in 106 O. L. 286, entitled:

"AN ACT

Authorizing the creation of a board of rapid transit commissioners in cities, defining its powers, and repealing an act entitled 'An act authorizing the issuance of bonds and acquisition and appropriation of property and rights by municipal corporations to construct and equip electric railways and terminals on leased canal and other property,' passed April 18, 1913 (103 Ohio Laws, 848)."

There have been some amendments to said statutes since the original enactment.

An extended discussion of the statutes in question is unnecessary. It is sufficient to say that among other powers given the Board of Rapid Transit Commissioners is this, as set out in section 4000-25:

"The board shall have the power to order the removal of pipes, sewers, conduits, poles and other structures that are in the way of construction authorized by this act." * * *

Evidently, the transaction referred to in your letter has reference to the statutory language just quoted.

An examination of the opinion of my predecessor which you refer to, discloses that the reasoning on which my predecessor reached his conclusions was, as to work done by the state under the so-called "force account" and "cost-plus" plans; the workmen engaged on the work were really employes of the state and were protected as to workmen's compensation by contributions by the state itself to the state insurance fund; and that as to work done under contracts entered into on competitive bids, it was the duty of the contractor to comply with the Workmen's Compensation Act. From these premises my predecessor was clearly right in concluding that there was no basis for a charge against the State or its subdivisions in favor of the contractor for premiums paid by the contractor into the state insurance fund.

But it is equally clear that my predecessor's reasoning cannot apply to the situation described in your letter. We do not have in the present instance a case of the State or its subdivisions doing work either by contract or otherwise. On the contrary, we have an arrangement whereby the Board of Rapid Transit Commissioners ordered a private corporation to do a certain thing with the understanding that said corporation would be fully reimbursed for its expenses incurred in complying with that order. Undoubtedly as between such private corporation and its cost-plus contractor, the item of premiums for workmen's compensation was an expense item going into the work. The corporation can only be made whole by returning to it the amount it has paid to its contractors on account of their having incurred the expense of the Workmen's Compensation premiums.

Therefore, in specific answer to your question, you are advised that it is proper for the City of Cincinnati or the Rapid Transit Commission to pay to the Telephone Company the item of Workmen's Compensation premium.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3814.

BRIDGES AND CULVERTS—WHERE RAILROAD COMPANY ERECTS AN OVERHEAD CROSSING PRIOR TO ENACTMENT OF GRADE CROSSING ELIMINATION STATUTES—DUTY OF RAILROAD COMPANY TO KEEP UP REPAIRS—WHEN COUNTY MAY AND SHOULD MAKE REPAIRS—HOW PAID—LEGAL PROCEDURE.

1. *Where a railroad company, prior to the enactment of the grade crossing elimination statutes (Secs. 8863 et seq.) has erected bridges along a public road so as to constitute an overhead crossing for the public road, it is the duty of the railroad company and not of the county to keep up all repairs of such bridges.*

2. *But by reason of section 2408 G. C., the county, in order to afford a safe way for the public, may and should make repairs of the railroad fails to do so, and charge the cost to the railroad company.*

3. *Further, an action in mandatory injunction may perhaps be available to the county commissioners to compel the railroad company to make the necessary repairs.*

COLUMBUS, OHIO, December 20, 1922.

HON. F. M. CUNNINGHAM, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—You have asked the opinion of this office as to the following matter:

“The county commissioners of Warren County have requested me to present a matter for your consideration. In March, 1877 the county commissioners entered into a contract or agreement with the superintendent of the Cincinnati & Muskingum Valley R. R. Co., concerning the erection of overhead bridges across the railroad. A copy of said agreement is herewith inclosed for your examination.

Section 8869, General Code, is as follows:

‘After the work is completed, the crossing and its approaches are to be kept in repair as follows: When the public way crosses the railroad by an overhead bridge, the frame work of the bridge and its abutments shall be maintained and kept in repair by the railroad company, and the surface of the bridge and its approaches, by the municipality or county in which they are situated. When the public way passes under the railroad, the bridge